Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.; GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.; CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.; KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS; KOBASHI FARMS; NAKAYAMA FARMS, INC.; and MIHARA FARMS,
Cross-Petitioners,

vs.

DANIEL R. GLICKMAN, Secretary of Agriculture,
Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Secretary of Agriculture violate core First Amendment values and trigger the strict scrutiny test (rather than the *Central Hudson* intermediate scrutiny test) by forcing California nectarine, peach, and plum growers (including respondents/cross-petitioners) to pay mandatory assessments into a "generic" advertising program where the advertising dollars and selection of advertising messages are controlled by a committee of respondents/cross-petitioners' competitors who can and do use the funds to promote their own varieties to the detriment of cross-petitioners' varieties, without providing any credit toward assessments for brand advertising conducted by respondents/cross-petitioners?

2. Can the Secretary of Agriculture, consistently with the Administrative Procedure Act and decisions of this Court, amend his regulations in 1988 and apply the amendment retroactively to 1980 to validate his tree-fruit committee's practice of requiring only California growers (including cross-petitioners who raise yellow skinned varieties of fruit) to throw away "regular" matured fruit worth millions of dollars and to sell only "well mature" fruit when the Secretary allows the committees, whose members grow red skinned varieties of fruit and directly compete with cross-petitioners, to define "well-matured" by the redness of the skin of the fruit, regardless of the actual internal maturity of the fruit

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioners respectfully file this conditional cross-petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 58 F.3d 1367 and reproduced in petitioner's Appendix at pp. 1a-39a. The Opinion of the District Court is unreported, and reproduced in petitioner's Appendix at pp. 40a-112a.

JURISDICTION

The Court of Appeals entered judgment on June 27, 1995. Petitions for rehearing were denied on September 18, 1995. Following an extension of time granted by Justice O'Connor, petitioner filed its petition for writ of certiorari on January 24, 1996. The petition was docketed on January 25, 1996. This is a conditional cross-petition pursuant to Supreme Court Rule 12.5. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions noted by petitioner U.S. Department of Agriculture ("USDA"), Cross-Petitioners submit additional relevant provisions of the Agricultural Marketing Agreement Act, the Administrative Procedure Act and Title VII of the Code of Federal Regulations. Specifically:

Relevant provisions of the Agricultural Marketing Agreement Act of 1937 are 7 U.S.C. 608c(7) and 608c(14). They are reproduced at App. to Cross-Petition at pp. 1a-2a;

Relevant provisions of the Administrative Procedure Act are at 5 U.S.C. § 552. It is reproduced at App. to Cross-Petition at p. 3a;

Additional relevant regulations implementing the Act are 7 C.F.R. §§ 51.1530, 51.3153, 916.30, 916.51, 917.40, 917.35, and the Nectarine, Plum and Peach Maturity Regu-

lations from 1979 through 1995 located at 7 C.F.R. §§ 916.352, 916.356, 917.447, 917.460, 917.446 and 917.459. They are reproduced at App. to Cross-Petition at pp. 4a-17a.

STATEMENT OF THE CASE

A. Introduction

This conditional cross-petition requests review of two challenges to provisions in the marketing orders for California peaches, plums, and nectarines issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, as amended ("AMAA" or "Act"),[1] should this Court deem it appropriate to grant USDA's petition.

First. The Ninth Circuit found the forced "generic" advertising program for peaches, plums, and nectarines invalid under *Central Hudson Gas & Elec. Corp. v. Public Service Comm.'n,* 447 U.S. 557 (1980). USDA seeks review by this Court arguing that the Ninth Circuit went too far because *Central Hudson* requires more exacting scrutiny than should apply here and that *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209 (1977) and *Keller v. State Bar of California,* 496 U.S. 1 (1990) should control in analyzing the impingement of cross-petitioner's free speech and association freedoms, if any, related to the tree fruit forced "generic" advertising program. If this Court deems it appropriate to hear USDA's argument that a different constitutional standard applies to the speech at issue, cross-petitioners respectfully suggest that the Ninth Circuit did not go far enough—strict scrutiny should apply to the compelled speech at issue herein.

Second. The Ninth Circuit rejected cross-petitioners' contention that "well-matured" regulations enforced by the tree fruit commodity committees were not validly promul-

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[1] 7 U.S.C. §601 *et seq.*

gated in 1980. The Ninth Circuit's conclusion that the Secretary "intended" to raise the maturity standards is insufficient to change the applicable law during the harvest seasons at issue. The Appellate Court decided an important federal question in a way that conflicts with relevant decisions of this Court. Regulations subject to the Administrative Procedure Act cannot be afforded the "full force and effect of law" if not promulgated pursuant to the statutory procedural minimum found in that Act. See, *Chrysler Corp. v. Brown,* 441 U.S. 291, 313 (1979); *NLRB v. Wyman-Gordon Company,* 394 U.S. 759, 764 (1969).

B. Litigation History

This matter began as a Title 7 U.S.C. § 608c(15)(B) review of agency action challenging provisions of the nectarine, plum, and peach marketing orders (7 C.F.R. §§ 916 and 917) issued by the Secretary under the AMAA.

Cross-petitioners directly compete in marketing nectarines, plums and peaches with the entire tree fruit industry, to include the chairmen and committee members of the nectarine, plum and peach committees. Most, if not all, market their nectarines, plums and peaches in California, as well as throughout the United States, and often compete for Cross-petitioners' buyers, brokers and growers. [C.R. 27 W/K-I, *Baker, Finding Nos. 50, 54 and 59, pp. 122-123].*[2]

[2]In accordance with the Rules of the Supreme Court, Rule 12.7, Cross-petitioners cite to the administrative record which was made a part of the underlying record of the Ninth Circuit. W-K-I refers to the parties' first administrative proceeding, conducted in 1988. W/K-II refers to the second administrative proceeding conducted in 1990; R.T. refers to the Reporter's Transcript of that proceeding, followed by the name of the witness and the pages within the transcript referenced; references to *Baker* are to the Administrative Law Judge's findings in her May 18, 1989 Decision and Order, which is part of the Ninth Circuit's record at Clerk's Record (C.R. 27).

Prior to May, 1980, Nectarine Regulation No. 10, Plum Regulation No. 14, and Peach Regulation No. 10, required nectarines, plums and peaches to meet the requirements of U.S. No. 1 grade. Said regulations stated that when used herein [U.S. No. 1] shall have the same meaning as set forth in United States Standards for nectarines, plums and peaches. App. to Cross-Petition at p. 8a, 12a, 14a. U.S. No. 1 Standard means that point where the fruit has reached that stage in the maturity process that it will continue to ripen after being picked from the tree. [*7 C.F.R. §§ 51.1530, 51.3153*]. App. to Cross-Petition at p. 4a.

In 1980, proposed rules were issued for nectarines, plums and peaches, which still required nectarines, plums and peaches to meet the requirement of U.S. No. 1 grade, and went on to add (and it remained the same until 1988): "Provided, that maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service." Said provisions went on to state that U.S. No. 1 means the same as defined in the United States Standards for Grades of Nectarines, Plums and Peaches. App. to Cross-Petition at pp. 8a, 12a, 14a.

The Nectarine, Plum and Peach Committees, desiring a "higher" maturity standard, asked the Federal-State Inspection Service (SPI) (meaning, Shipping Point Inspection) to raise the maturity level. The committees were advised by SPI that they could not change the U.S. Standards because they applied to all States, the committees were further advised that if they desire a "higher" maturity level for the fruit, they should get the marketing order amended to require a "well-matured" standard. [*W/K-I, Botkin, R.T., pp. 1155-1156*].

The Nectarine, Plum and Peach Committees, without authority from the Secretary of Agriculture, and in direct violation of the AMAA, took it upon themselves to create a

"higher" maturity level. Pursuant to the directions of the commodity committees, California Tree Fruit Agreement (CTFA) (as employees of the committees) issued new "regulations." In what was referred to as Nectarine Bulletin No. 1, CTFA supplied to all growers and handlers of nectarines a Bulletin which "sets forth everything you need to know about nectarine regulations for the 1980 marketing season." The Bulletin stated that all varieties of nectarines will be U.S. No. 1 with the following exception: "*Maturity*—Nectarines shall be "well-matured" which means that they meet the color standard established for each variety. This maturity requirement is more advanced than the maturity requirement of the U.S. No. 1 grade." [*W/K-I, Exhibit No. 2, MS-8-A-1*].

The Bulletin went on to indicate the purported authority for the new "maturity" standards, and on page 3 stated:

> "Your attention is directed to the new and advanced maturity requirement set forth on page 1 of this bulletin. This new maturity regulation was adopted by the *Nectarine Administrative Committee*. The new maturity level is based on color standards that have been developed and established by the Inspection Service and an industry maturity subcommittee. The color standards will be applied on a varietal basis and the maturity subcommittee will be available to deal with any maturity problems that arise."

[W/K-I, Exhibit No. 2, MS-8-A-1].

Immediately following the release of Nectarine Bulletin No. 1, CTFA, issued the Plum and Peach Bulletins which were substantially similar to that issued for nectarines, except with regard to plums, the fruit was to not only be "well-matured" but was also to meet "spring" requirements applicable to each variety and was required to satisfy these

requirements at the time of picking. [*W/K-I, Exhibit No. 2, MS-8-B*].[3] [4]

In 1987, cross-petitioners Wileman Bros. & Elliott, Inc. and Kash, Inc. filed administrative petitions [7 U.S.C. § 608c(15)(A)] with the United States Department of Agriculture ("USDA") alleging that the maturity regulations imposed on the California tree fruit industry were never lawfully promulgated and thus were unlawfully enforced by the nectarine, plum, and peach committees, appointed by the Secretary of Agriculture. Following a nine-day evidentiary hearing before USDA Administrative Law Judge Dorothea A. Baker, ALJ Baker ruled in favor of Wileman/Kash's contentions and found the nectarine, plum, and peach marketing orders invalid.

In June of 1988, Wileman/Kash filed a second petition challenging, *inter alia*, the forced "generic" assessment funded advertising program as violating freedom of association under *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977) and *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), and freedom of speech under *Central Hudson*, 447 U.S. 557. After an evidentiary hearing with approximately 20 days of testimony, ALJ Baker ruled in favor of Wileman/Kash on all issues and in dicta analyzed the forced "generic" advertising program finding it to be unconstitutional under both *Central Hudson and Frame.*

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[3] It should be noted that these "well-matured" regulations were never, through the 1987 harvest season, adopted by the Secretary of Agriculture, nor did they ever go through the Administrative Procedure Act process, nor were they ever published in the Federal Register. [*See: Wileman Bros. & Elliott, v. Giannini, 909 F.2d 333, 335 (9th Cir. 1990).*

[4] These new "well-matured" regulations were enforced by CTFA, under color of law, only against California growers. The other 25-35 states that grow tree fruit retained a U.S. No. 1 maturity standard.

Commencing with the 1987 harvest season, Wileman/Kash paid the assessments imposed by the marketing orders into an attorney-client trust account maintained by their attorney of record.[5] Despite Wileman/Kash's attempts to accommodate USDA, the U.S. Attorney's office filed assessment collection actions for injunctive relief ordering Wileman/Kash to pay over their assessment monies to the committees. District Court Judge Edward D. Price ordered the assessment monies at issue, plus all assessment monies for future harvest seasons, retained in trust pending final disposition of the challenged regulations.[6]

In the interim, cross-petitioners Gerawan Farming, Inc., Asakawa Farms, Inc., Chiamori Farms, Inc., Phillips Farms, Inc., Kobashi Farms, Inc., Tange Bros., Inc., Nagao Farms, Nilmeier Farms, Chosen Enterprises, George Huebert Farms, Wilmer Huebert Farms, Kobashi Farms, Nakayama Farms, Inc., and Mihara Farms filed administrative petitions raising similar issues to the Wileman/Kash petitions.

Thereafter, the Secretary of Agriculture's Judicial Officer issued decisions overruling Administrative Law Judge Baker on all issues favorable to cross-petitioners and affirmed on all issues favorable to USDA. Cross-petitioners filed com-

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[5] Approximately $.18-$.20 is assessed for every box of nectarines, plums and peaches packed in the San Joaquin Valley to cover the cost of advertising, inspection, and administration totaling approximately $10-12 million annually. Approximately 53% of these assessments fund the forced "generic" advertising program. See, App. to Pet. for Cert. at p. 8a, n. 3.

[6] More than $5.3 million of cross-petitioners' advertising and inspection assessments are now in trust with the Clerk of the United States District Court for the Eastern District of California.

plaints with the District Court seeking review of agency action pursuant to 7 U.S.C. § 608c(15)(B).

Cross-petitioners' various challenges to the marketing orders were heard on cross-motions for summary judgment. On January 27, 1993, the District Court ruled in favor of USDA on all issues, finding that the forced "generic" advertising program, while it "implicates the First Amendment rights of handlers forced to participate, it was enacted in furtherance of an ideologically neutral compelling state interest, and infringes on their rights to a minimum degree no more than necessary to achieve the stated goal." App. to Pet. for Cert. pp. 91a-92a. The District Court ruled that cross-petitioners' allegations regarding the "well-matured" maturity regulations were moot as USDA had since promulgated new regulations eliminating the "well-mature" standard.[7,8] App. to Pet. for Cert. pp. 56a-58a.

Cross-petitioners appealed to the Ninth Circuit. The Ninth Circuit reasoned that the compelled speech at issue

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[7]The parties stipulated that all cross-petitioners would rise/fall based on the decision issued by the District Court on the Wileman/Kash 7 U.S.C. § 608c(15)(B) Complaint. Upon the Court issuing its decision and judgment on the Wileman/Kash 15(B) Petition,the Court consolidated the remaining 14 cross-petitioners with Wileman/Kash for judgment and appeal.

[8]The same district court judge, in a related antitrust case (Wileman v. Giannini, CV-F88-251 OWW (E.D., Cal.)) in denying defendant committee members' motion to dismiss ruled ". . . the AMAA does not allow the marketing committee members or their agents to enforce maturity standards for the purposes of controlling output and causing harm to other growers and handlers . . . Plaintiffs' evidentiary showing is sufficient to preserve the issue of the antitrust liability of defendants for their actions as members or agents of the marketing committees in undertaking activities a reasonable official would understand impaired his competitors' ability to compete fairly in the market place in violation of federal law," in accord with Wileman v. Giannini, 909 F.2d 332 (9th Cir. 1990).

was commercial speech subject to analysis under *Central Hudson*, 447 U.S. 557, 566. App. to Pet. for Cert. p. 15a, 16a n. 7. The Ninth Circuit invalidated the compelled funding of the "generic" advertising program, concluding that the forced advertising program violated the First Amendment pursuant to *Central Hudson*.[9] See App. to Pet. for Cert. pp. 20a-21a. With respect to the maturity regulations for 1980-1987, without providing any analysis or explanation, the Ninth Circuit summarily concluded that the Secretary "intended" to increase maturity from U.S. No. 1 to "well-matured."

USDA petitioned for rehearing *en banc* on the First Amendment issue. The Court of Appeals denied USDA's petition for rehearing *en banc*.

LAW AND ARGUMENT

A. The Forced Imposition Of "Generic" Advertising Assessments Violates Cross-Petitioners' Core First Amendment Protection From Compelled Speech And Association

Cross-petitioners contend they cannot, consistently with the First Amendment, be required to finance, or be forced to associate with, an advertising program neither structured for

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[9]The Court, in determining that the speech undertaken through the generic advertising program was commercial speech, claimed that "[T]he handlers do not claim that any other type of speech is implicated." App. to Pet. for Cert. at p. 16a n. 7. The Court was mistaken. In "Appellants' Opening Brief" at pages 10-14 cross-petitioners argued, as they do herein, that being forced to fund a generic advertising program that is controlled by their competitors, for the benefit of their competitors, implicates their rights not to speak or associate with a message to which they disagree. Because the court found the advertising program at issue to be unconstitutional under the *Central Hudson* standard, the court did not address cross-petitioners' compelling governmental interest argument.

their benefit nor the tree fruit industry's benefit, promoting a message with which they disagree, and directly promoting their competitors' product.

The Agricultural Marketing Agreement Act of 1937, as amended, allows the Secretary of Agriculture, following reasoned decisionmaking, to collect assessments from handlers regulated under a marketing order for purposes of advertising. 7 U.S.C. § 608(6)(I). The Secretary, adopting the preferences of the nectarine, plum, and peach committees (consisting of cross-petitioners' competitors), opted to use "generic" instead of brand name specific advertising. 7 C.F.R. §§ 916.45 and 917.39. Collectively, cross-petitioners have been assessed in excess of one million dollars each harvest season—more than fifty percent of which is allocated toward the forced "generic" advertising program.

The Ninth Circuit invalidated the compelled funding of the "generic" advertising program, concluding that the forced advertising program violated the cross-petitioners' First Amendment commercial speech rights pursuant to *Central Hudson*, 447 U.S. 557.[10]

USDA's petition for writ of certiorari seeks review by arguing the Court of Appeals should not have applied *Central Hudson's* commercial speech test. Instead, USDA argues that it does not affirmatively restrict cross-petitioners' right to speak, but only compels them to fund speech that

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[10]The Ninth Circuit ruled that USDA failed the second prong of *Central Hudson*. The Court found no evidence that the forced "generic" advertising program was any better at increasing consumption than individualized advertising. See, App. to Pet. for Cert. p. 20a. USDA also failed the third prong of the *Central Hudson* test, in that only California handlers are required to pay advertising assessments, while approximately 25-35 states commercially handle peaches, nectarines and plums. USDA's claim that a more narrowly tailored program would result in free riders was found to be unpersuasive. "If the Secretary is concerned about free-riders, there are already plenty of them in other states." See, App. to Pet. for Cert. pp. 20a-21a.

USDA claims to be "generic," thus the appropriate test to apply is explained in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and its progeny: (1) compelled funding is germane to USDA's mission; (2) is justified by an important governmental interest and by the interest of avoiding free riders; and (3) does not significantly add to the burdening of free speech inherent in the allowance of the statutory scheme.[11] Pet. for Cert. p. 14 Cross-petitioners, however, assert in this cross-petition that the appropriate standard to apply to USDA's compelled funding of the forced "generic" advertising programs is strict scrutiny.

The First Amendment right of freedom of thought and association includes both the right to speak freely and the right to refrain from speaking at all. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-634 (1943); *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974); *Wooley v. Maynard*, 430 U.S. 705 (1977).

In *Riley v. National Federation of the Blind North Carolina, Inc.*, 487 U.S. 781, 108 S.Ct. 2667, 2677 (1988), this Court held that the level of scrutiny is determined by the nature of the speech compelled and the effect of the compelled statements: "Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statements thereon."

In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 n. 11 (1993), the Court recognized that regulation neither aimed at the content of commercial speech nor the adverse effect stemming from the content of commercial speech could be subject to strict scrutiny. The obvert of this applied to the committees' compelled speech that purports to be "generic"—but is not—supports the conclusion that

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[11] USDA argued the opposite in the courts below—that *Central Hudson* applied, but *Abood* and its progeny did not.

the committees compelled substantially more than mere commercial speech, thereby subjecting the forced "generic" advertising program to more exacting scrutiny than *Central Hudson.*

When Congress, the States, or agencies regulate commercial speech, it is in the context of protecting consumers from false, deceptive or misleading information. When states have restricted commercial advertising by attorneys, it is for the same purpose, as well as to protect over-reaching by the attorneys. In these instances, the speakers all desire to engage in the particular commercial speech to begin with—they were not compelled to engage in speech to which they are allowed no input. Cross-petitioners admit that if they voluntarily wanted to advertise, the commercial speech test is appropriate to establish the parameters for regulating that speech. However, the compelled speech at issue herein reaches much further.

The forced "generic" advertising program requires cross-petitioners to promote their competitors' fruit. The marketing orders provide for "generic" advertising at the discretion of the Secretary; theoretically, no specific variety of any grower/handler is promoted through the Secretary's "generic" advertising program. [W/K-II, Exhibit No. 258]. Yet, the 1989 promotional chart, distributed throughout the nation by the committees, includes the promotion of the "Red Jim" nectarine, an exclusive proprietary variety of one of the commodity committeemen. [W/K-II, Exhibit No. 256; W/K-II, Parker, R.T., pp. 2275-2295].

The Red Jim nectarine directly competes with cross-petitioners' varieties and is admittedly one of the more popular varieties in the marketplace.[12] For cross-petitioners

[12]As a proprietary variety, cross-petitioners are not lawfully able to plant or sell the "Red Jim" nectarine, yet they are forced to pay assessments to promote their competitor's fruit.

to directly compete with the Red Jim nectarine, they must expend additional money and effort to promote their own varieties. Yet, while they expend their own money to compete with the Red Jim, the committees are, at the same time, expending cross-petitioners' "generic" advertising assessments to promote their competitor's variety. [W/K-II, *Gerawan*, R.T., p. 1767; W/K-II, *Parker*, R.T., pp. 2275-2295].[13] While cross-petitioners compliment the successful promotion of the Red Jim nectarine, they do not want their annual assessment dollars used by the committees to directly promote their competitor's fruit. Cross-petitioners take the position that the "generic" advertising program:

> "... is not helping me and I don't want my dollars being spent for me by a committee or anybody else. I will spend my own dollars on what I created and what I produce. .... It is proven that free enterprise and private industry is the essence of this whole thing.
>
> ... I am interested in advertising ... my label. I am not interested in putting my money in anybody else's advertising program. I have the right as a grower to grow what I wish to grow. I don't care what CTFA does with their money. I just don't want any of my money in it. I just don't want any of my money used. Whether it is effective for them or not is of no concern ... if growers want to form their own co-ops and they want to

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[13]The district court found the use of generic advertising to promote a competitor's proprietary variety to be *de minimis* because the chart included 25 varieties of California summer tree fruits. However, upon reviewing the brochure [W/K-II, Exhibit No. 256] there are only 7 varieties of nectarines listed within the brochure. Six are "generic" and the seventh is the proprietary "Red Jim" variety exclusively marketed by nectarine committee member Jim Ito. Moreover, testimony demonstrates that the committees' attempt to promote "generic" varieties which are selected from *the top 15 most* popular varieties. This is not "generic" advertising—it promotes particular varieties selected by the committee members.

> be competitive . . . then God bless them, go for it. It is not a question whether CTFA is effective or not effective for anybody else. They are not effective for me, they are a hinderance to me. I am not here to judge what they do for somebody else."

[W/K-II, *Gerawan*, R.T. p. 1835-1836.]

Additionally, the committees' "generic" advertising program promotes, *inter alia*, two falsehoods that cross-petitioners cannot condone — that "red is better" and "all California fruit is the same." This is what is projected by the commercials advertising California fruit. Virtually every witness testified that different varieties of the same commodity have different tastes. Further, the same variety grown on different parcels of land will have differences in taste, color, size, amounts of soluble solids, etc. [W/K-II, *Mitchell*, R.T., pp. 4596-4597; W/K-II, *Chang*, R.T., pp. 2961-2963].

The tree fruit industry is extremely competitive, even in light of the program set up under the nectarine, peach, and plum marketing orders. Throughout the years, cross-petitioners have developed cultural practices that enable them to develop and harvest a high quality fruit—fruit they consider substantially superior to that grown by the majority of their competitors. They have invested substantial time and vast sums of money in developing these cultural practices. Cross-petitioners compete against each other and every other handler in the industry, including the individual committee members who control the "generic" advertising program. Cross-petitioners can survive by being efficient, smarter, and developing their own outlets for tree fruit that provide them a special niche. As a result of cross-petitioners' enterprise, they can expect a decent return on their substantial dollar investment.

Cross-petitioners, contesting the committees' excessive control of the tree fruit industry, have placed in excess of

5 million dollars in advertising and expense assessments, stemming from their suit with USDA dating back to 1987, in a court ordered trust account. When cross-petitioners are forced to spend this amount of money to speak and carry the message of the commodity committees, which expenditures do not assist their personal business programs, but are used to enhance the message of the commodity committees (cross-petitioners' competitors), one cannot contend that the burden is "small."

Cross-petitioners assert that when a businessman or a business is compelled to commercially speak and when they are further obliged to spend several hundreds of thousands of dollars each harvest season doing so, the protection afforded them must be greater than the tests used to restrict and regulate commercial advertising related to persons who voluntarily want to advertise to begin with, wherein the regulations merely seek to prohibit false, misleading or deceptive advertising.

The "commercial speech" at issue here and the regulations in question, compel cross-petitioners to carry out the message of their direct competitors on the commodity committees. Forcing corporations, like forcing businesses and individuals, to speak in a method and manner dictated by others, is an intolerable intrusion into exercising business judgment, and the Supreme Court has made it clear that the free speech clause of the First Amendment includes the choice not only to speak, but the choice not to speak at all. *Pacific Gas & Electric v. PUC of California* ____ U.S. ____, 106 S.Ct. 903, 912 (1986); *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 258 (1974).

Respondents recognize that the speech at issue in *Pacific Gas & Electric,* 106 S.Ct. 903 and *Tornillo,* 418 U.S. 241 was political speech. But it cannot be said that a businessman would bristle more at the government forcing him to carry a political message than he would if the government

ordered him to engage in commercial speech which advanced the position of his competitors, depleted his own funds that could otherwise be used to express his own advertising message, and compelled him to carry a commercial message, not his own, a message with which he wishes not to associate.

Moreover, in a purely commercial speech case, *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614 (1977), this Court stated that the commercial speech aspect of the First Amendment protected not only the listeners, but the speakers. As to the speaker's First Amendment commercial speech rights, the Court stated in response to the government's assertion that other avenues of communication remained open:

> "Although in theory sellers remained free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound tracks, demonstrations, or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than 'For Sale' signs [Citation]; are less likely to reach persons not deliberately seeking sales information [Citation], and may be less affective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold [Citations]." *Id.*, at 97 S.Ct. 1618.

Compelled "generic" advertising is certainly less likely to reach the persons not deliberately seeking cross-petitioners' sales information. Cross-petitioners' advertising budgets are severely restricted when several hundreds of thousands of dollars are extracted each harvest season by cross-petitioners' competitors through the forced "generic" advertising program. The regulations unquestionably place an "economically chilling affect" on cross-petitioners' ability to speak as they prefer. Thus, their "option" necessarily involves more

costs and less autonomy due to the restrictions placed on their budgets by being forced to contribute to the "generic" message which they ideologically, philosophically, economically, morally and commercially find unacceptable. As a result, promotional material they otherwise would like to create and distribute is substantially curtailed, thus, the ability to project the message they desire necessarily becomes less effective.

In addition, the regulations at issue here prevent, or severely hamper, the free flow of commercial information to the public. The court in *Linmark*, 431 U.S. 85, after finding the township's regulation unconstitutional as to the speaker, also deemed the regulation unconstitutional because it limited the free flow of information to the listeners. The same can be said here. When cross-petitioners are required to spend hundreds of thousands of dollars each and every year to project their competitors' message, to communicate that message in a method and manner that does not reach their niche in the market place, does not reach their potential buyers or contribute to their sales, they are severally restricted from engaging in the advertising or promotion which will reach the listeners' ears to whom they would otherwise desire to direct their message.

A unanimous Supreme Court in *Meyer v. Grant* ____ U.S. ____ , 108 S.Ct. 1886 (1988), addressed the fact that even if regulation allows alternative means of disseminating information, it does not detract from cross-petitioners' First Amendment claim. The Court also discussed the fact that it is presumed that the speaker is in the best position to determine the most economical avenue for dispensing information, and government, through regulation, compelling a more costly avenue cannot escape First Amendment scrutiny.

"Here, the committees are forcing deceptive speech to both the consumer and other businesses. When cross-peti-

tioners are compelled to engage in speech that they do not desire to be a part of, they are forced into proclaiming to the public, and to other businesses, that they desire to engage in the propounded advertisement; that they believe in the message propounded; that advertising is necessary in their businesses; that they believe the type of message conveyed is reaching the audience they wish to reach; and, that this message is being conveyed of their own free will.

To any argument the committees assert, that no First Amendment issues have been raised as there can be no coercion when someone advertises a product he is in the business of selling, is to say that cross-petitioners' competitors can actively be involved in determining what cross-petitioners' views should or should not be.

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."

Abood v. Detroit Board of Education, 431 U.S. at 235.

It is certainly not for cross-petitioners' competitors on the committee to determine what is the best way for cross-petitioners to spend their money in speaking to the public about their products (amounting to approximately $200 an acre), nor is it appropriate for the committees to contend that cross-petitioners should not object to their money being expended to generically advertise a commodity that they are in the business of selling.

The injury sought to be avoided is undue governmental control in dictating an individual's natural right to choose his own way of life. Clearly, coerced participation injures cross-petitioners, both by forceably taking from them their time, money and reputation, then using their money to project another's message, not to foster legitimate purposes

of the AMAA, nor to improve their business position, but rather to finance an advertising program designed to benefit their competitors.

B. The Minimum Maturity Standard Applicable To Nectarines, Peaches and Plums From The 1980 Through 1987 Harvest Seasons Was U.S. No. 1 — Not "Well-Matured"

The Ninth Circuit without explanation concluded that the Secretary intended to raise the maturity standards in the 1980 amendments to the Nectarine, Peach and Plum Marketing Orders. App. to Pet. for Cert. at pp. 24a-25a.[14] The fact that the Secretary may have *intended* to raise the maturity standards is insufficient to change the applicable law during the harvest seasons at issue.

The four corners of the relevant marketing order maturity regulations (i.e., 7 C.F.R. §§ 916.356, 917.459, 917.460) provided that the minimum maturity standard to be applied was U.S. No. 1. Even assuming, as the Ninth Circuit found, the Secretary had the intent to change the law and increase the minimum maturity standard, this intent was never published in the Federal Register nor codified in the Code of Federal Regulations until 1988. As a result, the maturity standard remained at U.S. No. 1 throughout the 1980 through 1987 harvest seasons.

The Secretary's 1980 amendments to the Nectarine, Plum and Peach Marketing Orders provided that the Federal-State inspectors could utilize color chips or any other tests the inspection service deemed proper to determine whether a grower's tree fruit met the *U.S. No. 1 maturity*

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[14] The Ninth Circuit held that the application of color chips to the "well-matured" standard was not arbitrary or capricious. However, the determination of whether the maturity regulations or their application was arbitrary or capricious does not become an issue until the precise nature of the underlying regulations is ascertained.

standard. On their face, the 1980 amendments did *not* modify existing "law" with respect to tree fruit maturity. Instead, the 1980 amendments merely expanded the testing devices available to the inspection service for determining whether a particular lot of fruit met the U.S. No. 1 maturity standard. The fact that maturity could be measured by the application of color chips or any other test did not alter the existing maturity standard. *Wileman Bros. & Elliott v. Giannini*, 909 F.2d 332, 335 (9th Cir. 1990).

It is hornbook administrative law that an agency, in order to establish, amend, or alter an enforceable regulation or law, is required to properly promulgate and publish its intent according to specific and well-established procedures. These detailed procedures are set out in the Administrative Procedure Act (5 U.S.C. 551 *et.seq.*). A federal agency, such as the United States Department of Agriculture, must publish its regulations, and any changes or modifications thereto, in the Federal Register. 5 U.S.C. 552(a)(1)(D). *Anderson v. Butz*, 550 F.2d 459 (9th Cir. 1977). Simply put, even if an agency intended to effectuate a change to its regulations, if this intent is not procedurally sound and properly published, it cannot be the law. *PPG Industries, Inc. v. Costle*, 659 F.2d 1239 (D.C. Cir. 1981).

To interpret the meaning of a regulation, a court must first look to the plain meaning of the language employed; i.e., the "four corners" of the regulation. If there is no ambiguity within the regulation's language, then the words used must be interpreted according to their common, ordinary meanings. *D & W Food Ctrs., Inc. v. Block*, 786 F.2d 757, 758 (6th Cir. 1986); *Anderson v. Butz*, 550 F.2d at 463. The Ninth Circuit concluded, without any clarifying analysis, that because in the "supplementary information" within the Federal Register the Secretary referenced the committees' desire for "higher" maturity, the Secretary intended to create the "well-matured" maturity regulations. App. to Pet.

for Cert. at p. 24a. The Court ignored that the Secretary did not incorporate any language allowing for heightened maturity standards in the amended regulations as published. App. to Cross-Petition at pp. 8a, 12a, 14a.

Nowhere in the 1980-1987 marketing order regulations does the Secretary state, or even imply, that the maturity level shall be "higher" or "well-matured." The regulations state that maturity will be U.S. No. 1, and that maturity will be determined by the application of color standards, per variety, or any other test deemed appropriate by the Federal or Federal-State Inspection Service. App. to Cross-Petition at pp. 8a, 12a, 14a. The Secretary did *not* establish a "higher" maturity standard or a "well-matured" standard. *Wileman v. Giannini*, 909 F.2d at 335. The Court and/or USDA cannot construe a regulation to contend what was never expressed. *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1118-1119 (10th Cir. 1987).

When the terms of the statute are unambiguous, judicial inquiry is complete and conclusive. When the language is clear, the duty of the judiciary is to follow that language and give it effect. When the language of a statute is clear and unambiguous, the starting point for interpreting the statute is the language itself, and there is neither need nor warrant to look elsewhere. *Reuben v. United States*, 449 U.S. 424, 430 (1981); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *U.S. v. Clark*, 454 U.S. 555, 560 (1982). "Legislative history should not be used as a guide to the meaning of a statute that is plain and unambiguous on its face." *McQuiston v. Marsh*, 707 F.2d 1082, 1084 fn. 1 (9th Cir. 1983).

The Ninth Circuit in *Wileman v. Giannini*, 909 F.2d. 322, analyzed these same marketing order maturity regulations and correctly concluded that "[t]he language of a regulation or statute is the starting point for its interpretation. The plain meaning governs unless a clearly expressed legislative

intent is to the contrary, or unless such plain meaning would lead to absurd results." *Id.* at pp. 335-336. The *Giannini* court acknowledged that the Secretary may well have intended to impose a heightened maturity standard on nectarines, peaches and plums. However, the regulations adopted and published " . . . do not effectuate this supposed intent. The court cannot rely on this vague suggestion of intent to rationalize or disregard the clear language of the regulation." *Id.*, 909 F. 2d. at 336.

A review of the Nectarine, Peach and Plum Marketing Orders and their amendments from 1979 through 1995 undeniably demonstrates that the minimum maturity grade in place during the 1980-1987 time period was U.S. No. 1 — not "well-matured." The term "well-matured" was never mentioned or published in the Federal Register or the Code of Federal Regulations until 1988. (App. to Cross-Petition at pp. 8a-17a.

For example, for years prior to and including 1979, the maturity standard for nectarines[15] as published in the Code of Federal Regulations read, in pertinent part, as follows:

> " . . . No handler shall handle:
>
> (1) Any package or container of any variety of nectarines unless such nectarines grade at least *U.S. No. 1.*

7 C.F.R. § 916.352 Nectarine Regulation 10 (emphasis added); See, App. to Cross-Petition at p. 8a.

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[15] Significantly, the language and timing of the amendments to the maturity regulations for peaches and plums virtually mirror those of the nectarine regulations. (The nectarine, peach and plum maturity regulations and their amendments for years prior to and including 1979 through the 1995 harvest seasons are reproduced at App. to Cross-Petition at pp. 8a-17a.

In 1980, the Secretary amended the nectarine maturity regulation within the C.F.R. to provide:

> " . . . No handler shall handle:
>
> (1) Any package or container of any variety of nectarines unless such nectarines meet the requirements of *U.S. No. 1 grade*: *Provided*, that maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service;"

7 C.F.R. § 916.356 Nectarine Regulation 14 (Emphasis added); See, App. to Cross-Petition at p. 8a.

The language of this regulation is not ambiguous. Any attempt by the Secretary or any other individual or entity to create an ambiguity by pointing to statements in extraneous documents such as "supplemental information" or tree fruit committee bulletins cannot be permitted.[16] The maturity regulation clearly and unambiguously retained the maturity level at U.S. No. 1, to be "determined by the application of color standards by variety or such other tests" which the inspection service determined to be appropriate—not "well-matured."

In contrast to the prior regulations, commencing in 1988 (and lasting through 1991), the nectarine maturity regulation within the C.F.R. read, in pertinent part:

> "(a) No handler shall ship:
>
> (1) Any lot or package or container of any variety of nectarines unless such nectarines meet the require-

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[16] An agency's "guidelines" which interpret its mandatory regulations must also be published or incorporated by reference in the Federal Register to have any legal effect. *PPG Industries, Inc. v. Costle*, 659 F.2d 1239 (D.C. Cir. 1981). Here, the tree fruit committee bulletins were never published or referenced in the Federal Register. The Bulletins are without legal effect. See also, *Dean v. Butz* 428 F.Supp. 477 (D.C. HA. 1977).

> ments of U.S. No. 1 grade, *except that nectarines shall be "well-matured" rather than "mature" but not overripe or shriveled."*

7 C.F.R. § 916.356 Nectarine Regulation 14 (emphasis added); See, App. to Cross-Petition at p. 9a.

Even the most simplistic reading of the nectarine maturity regulations conclusively illustrates the requirement that nectarines be "well-matured" rather than U.S. No. 1 was not adopted and/or published, and thus was not the law, until 1988.[17]

The language of the 1980 marketing order amendments with respect to tree fruit maturity regulations is clear and unambiguous. As a result, the Court need not look beyond the plain meaning of the language contained in the Code of Federal Regulations. The "well-matured" standard was neither published in the Federal Register nor codified in the Code of Federal Regulations prior to 1988. The minimum maturity standard, as set forth in the Code of Federal Regulations from 1980 through 1987, was U.S. No. 1. The tree fruit committees' successful efforts to enforce a maturity level above U.S. No. 1 grade from 1980 through 1987 were not permitted by the regulations, and clearly was not the "law."

A fundamental issue presented is whether the Secretary of Agriculture may raise the minimum maturity standard from U.S. No. 1 to "well-matured" (or any undetermined

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[17] It is noteworthy that the Secretary's 1988 amendment to the tree fruit marketing orders closely followed Administrative Law Judge Baker's Decision and Order in appellants' 7 U.S.C. § 608c(15)(A) administrative challenge to the validity of the "well-matured" standard wherein ALJ Baker concluded that the "well-matured" standard was never properly promulgated nor published, and thus was not the law.[W/K-I, C.R. 27].

standard above U.S. No. 1), without publishing amendments to existing regulations. Cross-petitioners contend that any attempt to change a law or regulation *the violation of which is punishable as a crime*[18] without providing sufficient notice to the public flies in the face of the Administrative Procedure Act and cannot be enforced against individuals without proper notice that their actions are unlawful.[19] A regulation issued by an agency must afford reasonable warning of proscribed conduct in light of common understanding and practices or it will not pass constitutional muster. *Ryder Truck Lines, Inc. v. Brennon,* 497 F.2d 230 (5th Cir. 1974). A statute or ordinance is unconstitutionally vague if it either does not give fair warning of proscribed conduct or if it amounts to unrestricted delegation of power that enables enforcement officials to act arbitrarily and with unchecked discretion. *Keeffe v. Library of Congress,* 777 F.2d 1573

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[18]Failure to comply with any of the terms of the marketing orders subjects a handler, upon conviction, to up to a $5,000.00 fine for each violation; each day in which a violation occurs is treated as a separate violation. See, 7 U.S.C. § 608c(14).

[19]The importance of assuring the clarity of regulations which carry a criminal penalty was addressed in *D & W Foods Ctrs. v Block, supra.* In this regard, the court stated:

> "Any remaining doubt that the Secretary's construction of § 606 must be rejected disappears when we consider the criminal provisions of the FMIA. Section 676(a) provides criminal penalties for violation of any section of the Act. No principal of law is better established than the necessity of criminal law speaking clearly. Accordingly, courts are bound to construe narrowly the applicability of any criminal statute. e.g. *United States v. Bass,* 404 U.S. 336, 346-48, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971). Here, the Secretary invites us to adopt a construction of 'packing . . . or similar establishment' that is not plain in the statute or its regulation; that may remain unknown to most grocery stores for its lack of publication; and that might subject this plaintiff and hundreds of other similarly-situated businesses to criminal liability. We decline the invitation . . . D & W Foods Ctrs. v. Block, 786 F.2d at p. 758."

(D.C. Cir. 1985); *Washington Mobilization Committee v. Cullinane,* 566 F.2d 107, 117 (D.C. Cir. 1977). As the Supreme Court stated in *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298 (1972):

> "We insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."

Pursuant to the Administrative Procedure Act, an agency is required to publish all substantive rules of general applicability, statements of policy, or matters which adversely effect any segment of the public in the Code of Federal Regulations. 5 U.S.C. § 552(a)(1)(D).

Here, there can be no doubt the "well-matured" standard is a substantive rule of general applicability which has a significant impact on cross-petitioners. A maturity standard utilized to determine a fruit's marketability clearly applies to all tree fruit handlers — and is not merely an internal procedure or practice. See, *Hogg v. U.S.*, 428 F.2d 274 (6th Cir. 1970). In addition, as the committee members' enforcement of the "well-matured" standard forced virtually all tree fruit handlers (including cross-petitioners) to discard fruit which met U.S. No. 1 maturity but not well-maturity, it is undeniable that this regulation worked a significant adverse impact upon a segment of the public. 5 U.S.C. 552(a)(1)(D); see, *Anderson v. Butz*, 550 F.2d 459, 463.

The Secretary's 1980 through 1987 amendments to the Nectarine, Peach and Plum Marketing Order maturity regulations make absolutely no reference to either a "higher" or "well-matured" maturity regulation (see App. to Cross-

Petition at pp. 8a-17a. As such, the regulations certainly do not provide fair warning of proscribed conduct. An individual reading the regulations set forth in the C.F.R. could not possibly realize that the minimum maturity standard was anything other than U.S. No. 1.

Further, the Ninth Circuit's conclusion that the Secretary provided the committees with the authority to raise the maturity standard to something above U.S. No. 1 is not supported by the language of the maturity regulations at issue. Although cross-petitioners disagree with the Court's implication that the Secretary could lawfully allow the committees to promulgate heightened maturity standards (App. to Pet. for Cert. at p. 25a.), that finding is not in contention here.[20] The question presently addressed to the Court is — where in the regulations published in the Federal Register and codified in the Code of Federal Regulations is the term "well-matured" referenced or adopted prior to 1988?

Regardless of the Ninth Circuit's conclusion that the Secretary intended to raise the underlying minimum maturity standard to "well-matured" in 1980, that intent was not effectuated until it was eventually published in the Federal Register and the C.F.R. in 1988. Regulations subject to the

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[20]The Agricultural Marketing Agreement Act, and the marketing orders themselves, make it clear the the Secretary may not grant authority to the committees to adopt and implement regulations. The committees are limited only to making recommendations to the Secretary regarding amendments to any existing marketing order (see 7 U.S.C. §608c(7)(C)(iv); 7 CFR §§ 916.30, 916.51, 917.33, 917.40). Additionally, while the AMAA and the marketing orders provide that the committees may adopt rules and regulations to effectuate the terms and provisions of the marketing orders, in *Wileman v. Giannini*, supra, 909 F.2d 332, the Court understood that the raising of maturity standards " . . . are not the type of ministerial or facilitative regulations" that the Secretary could allow the committees to promulgate. *Id.*, 909 F.2d, at p. 337 fn. 7.

APA cannot be afforded the "force and effect of law" if not promulgated pursuant to the statutory procedural minimum found in that Act. *Chrysler Corp. v. Brown,* 441 U.S. 291, 313 (1979); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969).

Cross-petitioners do not challenge the Ninth Circuit's determination that the Secretary of Agriculture *intended* to raise the minimum maturity standard from U.S. No. 1 to a higher level in the 1980 marketing order amendments.[21] Regardless of the Secretary's intent, the language of the 1980 marketing order amendments unambiguously demonstrate that the underlying minimum maturity standard remained at U.S. No. 1. In fact, the minimum maturity standard continued to be U.S. No. 1 until the "well-matured" standard was codified in the marketing orders in 1988. (53 Fed. Reg. 19,226, 19,232 (1988) (codified as 7 C.F.R. §§916.356, 917.459, 917.460)).

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[21] The Secretary's silence with respect to the tree fruit committee members' actions in raising the minimum maturity standard does not equate to ratification or acceptance. *Wileman v. Giannini*, 909 F.2d at 337. However, for purposes of the issue at hand, the Secretary's intent (or lack thereof) as demonstrated by his silence is not relevant to the determination of whether the "well-matured" standard was published in the CFR, and thus enforceable law.

CONCLUSION

Should this Court grant USDA's Petition for Writ of Certiorari, the instant cross-petition should be granted to resolve these important questions.

Respectfully submitted,

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.; GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.; CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.; KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS; KOBASHI FARMS; NAKAYAMA FARMS, INC.; and MIHARA FARMS,
Cross-Petitioners,

vs.

DANIEL R. GLICKMAN, Secretary of Agriculture,
Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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The Agricultural Marketing Agreement Act of 1937, Title 7 U.S.C. 601 et seq., provides in pertinent part:

608c(7) Terms Common To All Orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions.

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of any agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There

shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: *Provided*, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

* * *

608c(14)

Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rate share of expenses) shall on conviction, be fined not less than $50 or more than $5,000, for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided*, That if the court finds that petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

The Administrative Procedure Act, 5 U.S.C. 551 et seq., provides, in pertinent part:

552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;

Title 7 of the Code of Federal Regulations provides, in pertinent part:

§ 51.1530 Mature.

"Mature" means that the fruit has reached the stage of maturity which will insure a proper completion of the ripening process.

§ 51.3153 Mature.

"Mature" means that the nectarine has reached the stage of growth which will insure a proper completion of the ripening process.

§ 916.30 Powers

The committee shall have the following powers:

(a) To administer the provisions of this part in accordance with its terms;

(b) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this part;

(c) To make and adopt rules and regulations to effectuate the terms and provisions of this part; and

(d) To recommend to the Secretary amendments to this part.

§ 916.51 Recommendations for regulation.

(a) Whenever the committee deems it advisable to regulate the handling of any variety or varieties of nectarines in the manner provided in § 916.52, it shall so recommend to the Secretary.

(b) In arriving at its recommendations for regulation pursuant to paragraph (a) of this section, the committee shall give consideration to current information with respect to the factors affecting the supply and demand for

nectarines during the period or periods when it is proposed that such regulations should be made effective. With each such recommendation for regulation, the committee shall submit to the Secretary the data and information on which such recommendation is predicated and such other available information as the Secretary may request.

§ 917.40 Recommendations for regulations.

(a) Whenever a commodity committee deems it advisable to regulate the handling of any variety or varieties of fruit in the manner provided in § 917.41, it shall so recommend to the Secretary.

(b) In arriving at its recommendations for regulation pursuant to paragraph (a) of this section, the commodity committee shall give consideration to current information with respect to the factors affecting the supply and demand for such fruit during the period or periods when it is proposed that such regulation should be made effective. With each such recommendation for regulation, the commodity committee shall submit to the Secretary the data and information on which such recommendation is predicated and such other available information as the Secretary may request.

§ 917.35 Powers and duties of each commodity committee.

Each commodity committee shall have the following powers and duties:

(a) With regard to the respective fruit for which it was established, to establish production research and marketing research and development projects as authorized under § 917.39, to recommend to the Secretary regulation of shipments pursuant to the provisions of this part, and to possess such other powers and exercise such other duties

as will properly effectuate the purpose of this part: *Provided, however*, That the Peach and Pear Commodity Committee shall each approve actions under § 917.39 and make said recommendations pursuant to §§ 917.40 through 917.43 only upon the affirmative vote of not less than nine members of each said committee: *Provided further*, That the Plum Commodity Committee shall approve such actions pursuant to § 917.39 or make said recommendations pursuant to §§ 917.40 through 917.43 only upon the affirmative vote of not less than eight members of said committee.

(b) To make such rules and regulations with respect to fruit for which it was established as may be necessary to effectuate the terms and provisions of this part.

(c) To forward to the Control Committee and to the Secretary a record of the minutes of each meeting of the commodity committee.

(d) To establish such other committees to aid the commodity committee in the performance of its duties under this part as may be deemed advisable.

(e) Each season prior to any recommendation to the Secretary for a regulation of shipments pursuant to §§ 917.40 through 917.43 to determine the marketing policy to be followed for the respective commodity during the ensuing fiscal period and to submit such policy to the Secretary, said policy report to contain, among other provisions, information relative to the estimated total production and shipments of the fruit by districts, information as to the expected general quality and size of fruit, possible or expected demand conditions of different market outlets, supplies of competitive commodities, such analysis of the foregoing factors and conditions as the committee deems appropriate, and the type of regulations

of shipments expected to be recommended for the respective fruit.

(f) To submit as soon as practicable after the beginning of each fiscal year to the secretary, for his approval, a budget of its expenses for such fiscal period, including its proportional share of the expenses of the Control Committee and an explanation of the items therein, and a recommendation as to the rate of assessment for the respective fruit for which the commodity committee was established.

(g) With the approval of the Secretary, to redefine the Districts into which the State of California has been divided under § 917.14 or change the representation of any representation area affecting the respective commodity committee: *Provided, however*, That if any such changes are made, representation on any such committee from the various representation areas shall be based, so far as practicable, upon the proportionate quantity of the respective fruit shipped from the respective representation area during the preceding three fiscal periods: *Provided further*, That the commodity committees shall follow the principle, so far as practicable, of assigning a member position on the commodity committees to any representation area from which five percent of regulated shipments have originated during such periods.

NECTARINE

For years prior to, and including 1979, the nectarine maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 916.352 Nectarine Regulation 10.

. . . no handler shall handle:

(1) Any package or container of any variety of nectarines unless such nectarines grade at least U.S. No. 1.

* * *

(b) As used herein, "U.S. No. 1" and "standard pack" mean the same as defined in the United States Standards for Grades of Nectarines (7 CFR 51.3145-51.3160): "No. 22D standard lug box" means the same as defined in section 1387.11 of the "Regulations of the California Department of Food and Agriculture," and all other terms mean the same as defined in the marketing order.

For the years 1980 through 1987, the nectarine maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 916.356 Nectarine Regulation 14.

. . . no handler shall handle:

(1) Any package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade: *Provided,* that maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal and FederalState Inspection Service; *Provided further,* That nectarines 2 inches in diameter or smaller, shall not have fairly light colored, fairly smooth scars which exceed the aggregate area of a circle ⅜ inch in diameter, and nectarines larger than

2 inches in diameter shall not have fairly light colored, fairly smooth scars which exceed and aggregate area of a circle ½ inch in diameter; *Provided further*, That an additional tolerance of 25 percent shall be permitted for fruit that is not well formed but not badly misshapen.

* * *

(b) As used herein, "U.S. No. 1" and "standard pack" means the same as defined in the United States Standards for Grades of Nectarines (7 CFR 2851.3145-2851.3160); "No. 22D standard lug box" means the same as defined in Section 1380.19(17) of the "Regulations of the California Department of Food and Agriculture."

Commencing in 1988 through the 1991 harvest seasons, the nectarine maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 916.356 Nectarine Regulation 14.

(a) No handler shall ship:

(1) Any lot or package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade, except that the nectarines shall be "well-matured" rather than "mature," but not overripe or shriveled . . .

* * *

(i) During the 1988 and subsequent seasons, the Federal or the Federal-State Inspection Service will use the maturity guides listed in Table I in making maturity determinations for the specified varieties. For these varieties, not less than 90 percent of any lot shall meet the color guide established for the variety, and an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety, except that for the Fairlane, Tom Grand, and 61-61 varieties of nectarines, not less than an aggregate area of 80 percent of the fruit surface shall meet

the color guide established for the variety. For varieties not listed, the Federal or Federal-State Inspection Service will use such tests as deemed to be proper by the Nectarine Administrative Committee and the Federal or Federal-State Inspection Service. A variance for any variety from the application of the maturity guides specified in Table I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of "well-matured." The maturity determination variance procedure is set forth as follows:

(b) *Definitions.* As used herein, "U.S. No. 1," "mature," and "standard pack" mean the same as defined in the United States Standards for Grades of Nectarines (7 CFR 51.3145 to 51.3160); "No. 22D standard lug box" means the same as defined in section 1380.19(17) of the "Regulations of the California Department of Food and Agriculture." "Well-matured" means a condition distinctly more advanced than "mature."

For the 1992 through 1995 harvest seasons, the nectarine maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 916.356 California Nectarine Grade and Size Regulation.

. . . no handler shall ship:

(1) Any lot or package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade: *Provided*, That nectarines 2 inches in diameter or smaller, shall not have fairly light colored, fairly smooth scars which exceed an aggregate area of a circle ⅜ inch in diameter, and nectarines larger than 2 inches in diameter shall not have fairly light colored, fairly smooth scars which exceed an aggregate area of a circle ½ inch in diameter: *Provided further*, That an additional tolerance of

25 percent shall be permitted for fruit that is not well formed but not badly misshapen. That Federal or Federal-State Inspection Service shall make final determinations on maturity through the use of color guides or such other tests as determined appropriate by the inspection agency.

* * *

(b) *Definitions.* As used herein, "U.S. No. 1," "mature," and "standard pack" mean the same as defined in the United States Standards for Grades of Nectarines (7 CFR 51.3145 to 51.3160); "No. 22D standard lug box" means the same as defined in section 1380.19(17) of the "Regulations of the California Department of Food and Agriculture." "Well-matured" means a condition distinctly more advanced than "mature."

PLUM

For years prior to, and including 1979, the plum maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.447 Plum Regulation 14.

. . . no handler shall ship any lot of packages or containers or any plums, other than the varieties named in paragraph (b) of this section, unless such plums grade at least U.S. No. 1.

* * *

(d) When used herein, "U.S. No. 1" and "serious damage" shall have the same meaning as set forth in the U.S. Standards for Fresh Plums and Prunes (7 CFR 51.1520-1538); and all other terms shall have the same meaning as when used in the amended marketing agreement and order.

For the years 1980 through 1987, the plum maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.460 Plum Regulation 19.

. . . no handler shall ship any lot of packages or containers or any plums, other than the varieties named in paragraph (b) hereof, unless such plums grade at least U.S. No. 1; *Provided,* That maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service.

* * *

(d) When used herein, "U.S. No. 1" and "serious damage" shall have the same meaning as set forth in the United States Standards for Fresh Plums and Prunes (7 CFR 2851.1520-2851.1538).

Commencing in 1988 through the 1990 harvest seasons, the plum maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.460 Plum Regulation 19.

(a)(1) No handler shall ship any lot of packages or containers of any plums unless such plums grade at least U.S. No. 1, except that the plums shall be "well-matured," rather than "mature" but not overripe or shriveled.

* * *

(2) During the 1988 and subsequent seasons, the Federal or Federal-State Inspection Service will use the maturity guides listed in Table I in making maturity determinations for the specified varieties. For these varieties, not less than 90 percent of any lot shall meet the surface color, flesh color or "spring" requirements established for the variety or not less than 90 percent of any lot shall meet the ground color standard established for the variety except that for the Ebony Variety, an additional lot tolerance of 17 percent shall be permitted for fruit not meeting the "spring" requirement. For varieties not listed, the Federal or Federal-State Inspection Service will use such tests as deemed to be proper by the Plum Commodity Committee and the Federal or Federal-State Inspection Service.

(3) A variance for any variety from the application of the maturity guides specified in Table I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of "well-matured." The maturity determination variance procedure is set forth as follows:

After 1990 the plum marketing order was no longer.

PEACH

For years prior to, and including 1979, the peach maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.446 Peach Regulation 10.

. . . no handler shall handle:

(1) Any package or container of any variety of peaches unless such peaches meet the requirements of U.S. No. 1 grade.

* * *

(d) Terms used in the amended marketing agreement and order shall, when used herein, have the same meaning as given to the respective term in said amended marketing agreement and order: "U.S. No. 1" and "standard pack" shall have the same meaning, respectively, as when used in the United States Standards for Peaches (7 CFR 51.1210-1223) . . .

For the years 1980 through 1987, the peach maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.459 Peach Regulation 14.

. . . no handler shall handle:

(1) Any package or container of any variety of peaches unless such peaches meet the requirements of U.S. No. 1 grade: *Provided*, That maturity shall be determined by the application of color standards by the Federal or Federal-State Inspection Service.

* * *

(d) As used herein, "U.S. No. 1" and "standard pack" mean the same as defined in the United States Standards for

Peaches (7 CFR 2851.1201-1223); and "No. 22D standard lug box" and "No. 12B standard fruit (peach) box" mean the same as defined in Section 1380.19(18) of the "Regulations of the California Department of Food and Agriculture."

Commencing in 1988 through the 1991 harvest seasons, the peach maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.459 Peach Regulation 14.

(a) No handler shall ship:

(1) Any lot or package or container of any variety of peaches unless such peaches meet the requirements of U.S. No. 1 grade, except that the peaches shall be "well-matured," rather than "mature," but not overripe or shriveled. (i) During the 1988 and subsequent season, the Federal or Federal-State Inspection Service shall use the maturity guides listed in Table I in making maturity determinations for the specified varieties. For these varieties, not less than 90 percent of any lot shall meet the color guide established for the variety, and an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety. For varieties not listed, the Federal or Federal-State Inspection Service will use such tests as deemed to be proper by the Peach Commodity Committee and the Federal or Federal-State Inspection Service. A variance for any variety from the application of the maturity guides specified in Table I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an

inappropriate measure of "well-matured." The maturity determination variance procedure is set forth as follows:

* * *

(d) As used herein, "U.S. No. 1," "mature," and "standard pack" mean the same as defined in the United States Standards for Grades of Peaches (7 CFR 51.1210 through 51.1223); and "No. 22D standard lug box" and "No. 12B standard fruit (peach) box" mean the same as defined in section 1380.19(18) of the "Regulations of the California Department of Food and Agriculture." "Well-matured" means a condition distinctly more advanced than "mature."

For the 1992 through 1995 harvest seasons, the peach maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.459 California Peach Grade and Size Regulation.

. . . no handler shall ship:

(1) Any lot or package or container of any variety of peaches unless such peaches meet the requirements of U.S. No. 1 grade. The Federal or Federal-State Inspection Service shall make final determinations on maturity through the use of color chips or other tests as determined appropriate by the inspection agency.

(i) The Federal or Federal-State Inspection Service will use the maturity guides listed in TABLE I in making maturity determinations for the specified varieties when inspection to the "well matured" level of maturity. For these varieties, not less than 90 percent of any lot shall meet the color guide established for the variety, and an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety. For varieties not listed, the Federal or Federal-State Inspection Service will

use such tests as its deems proper. A variance for any variety from the application of the maturity guides specified in TABLE I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of "well matured."

(ii) If a grower or handler believes his/her fruit is meeting the appropriate maturity level but the fruit has not been so graded by the inspector, he/she may appeal the inspection by calling the officer-in-charge of the local Federal-State Inspection Service office to arrange for an on-site examination of the fruit.

* * *

(d) As used herein, *U.S. No. 1, mature*, and *standard pack* mean the same as defined in the United States Standards for Grades of Peaches (7 CFR 51.1210 through 51.1223); and *No. 22D standard lug box* and *No. 12(B) standard fruit (peach) box* mean the same as defined in section 1380.19(18) of the "Regulations of the California Department of Food and Agriculture." *Well-matured* means a condition distinctly more advanced than "mature."

(3)

No. 95-1393

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1995

WILEMAN BROS. & ELLIOTT, INC., ET AL.,
CROSS-PETITIONERS

v.

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE IN OPPOSITION

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QUESTION PRESENTED

Whether the application of a "well-matured" standard of maturity for California peaches, nectarines, and plums from 1980 through 1987, pursuant to marketing orders issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, violated the Administrative Procedure Act or was unconstitutionally vague.

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BRIEF FOR THE SECRETARY OF AGRICULTURE IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a)[1] is reported at 58 F.3d 1367. The opinion of the district court (Pet. App. 40a-100a) is unreported. The opinions of the Judicial Officer of the Department of Agriculture are reported at 49 Agric. Dec. 705 and 50 Agric. Dec. 1165.[2]

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[1] All references to "Pet." and "Pet. App." refer to our petition for a writ of certiorari in No. 95-1184 and the appendix thereto.

[2] The Judicial Officer (JO) issued two decisions, one dismissing each of the administrative petitions that cross-petitioners, among others, filed in the administrative

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1995. A petition for rehearing was denied on September 18, 1995. Pet. App. 2a. On December 15, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including January 16, 1996. On January 11, 1996, Justice O'Connor further extended the time within which to file a petition to and including January 24, 1996, and the Secretary's petition was filed on that day and docketed on January 25, 1996. The cross-petition for a writ of certiorari was filed on February 26, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from administrative petitions filed by cross-petitioners and others challenging certain provisions in the marketing orders for California peaches, nectarines, and plums issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U.S.C. 601 *et seq.* On review of the Secretary's decisions dismissing the petitions, the Ninth Circuit sustained

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proceedings that led to the present case. Because of the length of the decisions and the fact that they are reported, we reproduced in the appendix to our petition in No. 95-1184 only that portion of the JO decision that addressed the First Amendment issue presented by our petition. Cross-petitioners have not reproduced any portion of either JO decision in the appendix to their conditional cross-petition. In the appendix to their brief in opposition to our petition, however, cross-petitioners have reproduced the decision of the Administrative Law Judge that was reversed by the JO in the decision reported at 50 Agric. Dec. 1165.

cross-petitioners' First Amendment challenge to the provisions in the marketing orders authorizing industry-funded generic advertising programs for those fruits. The Ninth Circuit rejected cross-petitioners' other challenges, however, including their challenge to the promulgation and administration of the maturity provisions in the marketing orders in effect from 1980 through 1987. In No. 95-1184, the Secretary has petitioned for a writ of certiorari to review the Ninth Circuit's holding on the First Amendment issue. Cross-petitioners seek further review of the Ninth Circuit's ruling on the fruit-maturity issue in the event that this Court grants the Secretary's petition.

Our petition in No. 95-1184 describes (at 4-14) the statutory and regulatory provisions and the course of the present litigation relevant to the First Amendment issue. We describe below the additional provisions and facts relevant to the fruit-maturity issue.

1. The AMAA authorizes the Secretary to include provisions in a marketing order regulating the "grade, size, or quality" of a commodity. 7 U.S.C. 608c(6)(A). Before 1980, the marketing orders for California peaches, nectarines, and plums required those fruits to meet grade "U.S. No. 1." Pet. App. 22a. Grade U.S. No. 1 is a term defined in regulations of the Secretary for use in a variety of regulatory contexts, including but not limited to AMAA marketing orders. See 7 U.S.C. 1622(c). As defined for nectarines, for example, U.S. No. 1 requires the fruit to be "mature but not soft or overripe * * * [with] [a]t least 75 percent of the nectarines in any lot [showing] some blushed or red color." 7 C.F.R. 51.3147.[3]

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[3] The definition of U.S. No. 1, as it relates to maturity, is similar for peaches and plums. 7 C.F.R. 51.1212; 51.1521.

In 1980, the Secretary amended the maturity provisions of the marketing orders by adding, after the preexisting language requiring the fruits to meet U.S. No. 1 grade, a proviso stating that "maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service" (a joint federal-state program for fruit inspection and grading). See Pet. App. 22a; 45 Fed. Reg. 32,308, 45,252 (1980) (nectarines); 45 Fed. Reg. 32,310, 44,917 (peaches); 45 Fed. Reg. 33,596, 47,115 (1980) (plums).[4] The administrative record accompanying the amendments stated that "provision is made for a higher maturity standard." *Id.* at 45,252 (nectarines); see also *id.* at 47,116 (plums). In the wake of the 1980 amendments, the committees

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Grade U.S. No. 1 also addresses other characteristics of fruits and vegetables, in addition to maturity. For example, U.S. No. 1 requires nectarines to be "free from decay, broken skins which are not healed, worms, [and] worm holes," and free from injury or damage caused by a wide variety of specific plant diseases, pests, and other conditions. 7 C.F.R. 51.3147.

[4] As amended in 1980, the maturity provision in the marketing order for nectarines, for example, provided:

> [N]o handler shall handle * * * [a]ny package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade: *Provided, That maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service.*

45 Fed. Reg. 45,253 (1980) (1980 amendment italicized). The text of the amended maturity provision for nectarines was similar to those for peaches and plums, and, in challenging those provisions, cross-petitioners have not distinguished among them. See Pet. App. 22a.

responsible for implementing the marketing orders applied a higher maturity standard that came to be known as the "well-matured" standard. See Pet. 5-6 (describing duties of commodity committees).

In 1988, the Secretary further amended the marketing orders expressly to provide for the "well-matured" standard of maturity. Pet. App. 22a; see 53 Fed. Reg. 19,226 and 19,232 (1988).

In 1992, the Secretary again amended the marketing orders by establishing a two-tiered standard for nectarines and peaches. 57 Fed. Reg. 20,735 and 42,681 (1992).[5] The minimum maturity standard is "mature," and handlers may voluntarily seek to earn the "well-matured" designation. Pet. App. 23a.

2. Cross-petitioners are handlers (*i.e.*, packers and distributors) of California peaches, nectarines, and plums. They and other handlers of those fruits filed administrative petitions with the Secretary pursuant to 7 U.S.C. 608c(15)(A) challenging, among other things, the maturity standards applied by the responsible committees under the marketing orders in effect from 1980 through 1987. Pet. App. 6a, 22a-27a. Reversing decisions by an administrative law judge in favor of the handlers, *id.* at 6a, the Judicial Officer (JO) of the Department of Agriculture ruled in favor of the Secretary on all issues, *id.* at 7a.

As relevant here, the JO rejected the handlers' contention that the 1980 amendment to the marketing orders did not change the maturity standard previously imposed under grade U.S. No. 1. 49 Agric. Dec.

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[5] The provisions in the marketing order applicable to plums ended in 1991, after a majority of plum producers failed to vote for its continuation in a periodic referendum. Pet. App. 5a n.1, 43a; 56 Fed. Reg. 23,773 (1991).

at 796-803; 50 Agric. Dec. at 1327-1328. The JO determined that the rulemaking record made clear that the Secretary in 1980 had intended "to establish a higher maturity standard for plums and nectarines than the U.S. No. 1 standard previously in effect." 49 Agric. Dec. at 798. The JO concluded that "the regulations should be construed to effectuate the Secretary's intent." *Ibid.*[6]

3. Cross-petitioners and other handlers filed this action in the United States District Court for the Eastern District of California under 7 U.S.C. 608c(15)(B), seeking judicial review of the JO's decisions. See Pet. 9-10. The district court held, *inter alia*, that their challenge to the promulgation and administration of the maturity regulations contained in the marketing orders in effect from 1980 through 1987 was moot in light of the Secretary's 1992 amendments to those regulations. Pet. App. 56a-58a.

4. The court of appeals held that the handlers' challenge to the fruit maturity regulations was not moot, because, in its view, if their challenge succeeded, they would be entitled to a refund of assessments used to administer those regulations. Pet. App. 23a-24a.

On the merits, the court of appeals rejected cross-petitioners' contention that the committees lacked authority to apply a "well-matured" standard under the marketing orders in effect from 1980 through 1987. Cross-petitioners based their contention chief-

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[6] In the second administrative decision, the JO explained that peaches, which were regulated in the same marketing order as plums, were also covered by this determination. 50 Agric. Dec. at 1328.

ly on the court's prior decision in *Wileman Bros. & Elliott, Inc.* v. *Giannini*, 909 F.2d 332, 336 (1990), which, as the court here described it, "held that tree fruit committee members had not acted in accord with the marketing orders in promulgating the heightened maturity standards in 1980 and thus were not immune from suit in an antitrust action brought by several handlers." Pet. App. 24a. The court observed that *Giannini* was "primarily concerned with the issue of immunity from an antitrust suit." *Id.* at 25a. The court also observed that *Giannini* "was decided in the context of an appeal of a Rule 12(b)(6) dismissal for failure to state a claim." *Ibid.* In that context, the court explained, "[t]he *Giannini* court could not resolve the ambiguity it found in the regulation promulgated by the Secretary and had to hold in favor of the plaintiffs." *Ibid.* In the present context, however, the court determined from the administrative record that "it is clear that the Secretary intended to raise the maturity standards and to allow the committees to promulgate the implementing regulations, just as they had with numerous standards in the past." *Ibid.*

The court of appeals also rejected cross-petitioners' contention that the heightened maturity standard was not supported by substantial evidence. Pet. App. 26a n.12.

ARGUMENT

1. Although cross-petitioners prevailed in the court of appeals on the First Amendment issue, they argue that, in addressing that issue, the court did not apply a stringent enough standard of review. Cross-Pet. 10-20. That argument provides no basis for granting their conditional cross-petition. This Court

"reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Because cross-petitioners prevailed on the judgment as to the First Amendment issue, they are not entitled to petition for a writ of certiorari on that issue, at least in the absence of extraordinary circumstances, which are not claimed to exist here. See Robert L. Stern, et al., *Supreme Court Practice* § 2.4, at 45 (7th ed. 1993). Moreover, if this Court grants the Secretary's petition in No. 95-1184, cross-petitioners may advance their arguments for a more stringent standard of review in support of the judgment below on the First Amendment issue. See, *e.g.*, *Schweiker* v. *Hogan*, 457 U.S. 569, 585 n.24 (1982); *Hankerson* v. *North Carolina*, 432 U.S. 233, 240 n.6 (1977). Because our position on the First Amendment issue is set forth in our certiorari petition (at 14-30), we do not address it further here.

2. Cross-petitioners contend (Cross-Pet. 20-30) that the responsible committees lacked authority to apply a "well-matured" standard under the marketing orders in effect from 1980 through 1987.[7] They base that contention on their view that the maturity

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[7] The court of appeals concluded that cross-petitioners' challenge to the "well-matured" standard was not moot because cross-petitioners might be entitled to a refund of assessments used to pay for the administration of the standard from 1980 through 1987 if their challenge was successful. Pet. App. 23a-24a. As we argued below, cross-petitioners would not be entitled to a refund if they prevailed on their challenge. See Gov't C.A. Br. 43-48. However, as we acknowledged below, cross-petitioners' challenge is not moot for another reason—namely, that the Secretary could return to the pre-1988 regime, so that the issue would be capable of repetition yet evading review. *Id.* at 30-31.

provisions in the marketing orders for those years cannot be read to have increased the maturity standard previously in effect. Cross-petitioners argue that the assertedly unauthorized application of the "well-matured" standard violated the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and the doctrine of unconstitutional vagueness.

The proper interpretation of the marketing orders for California peaches, nectarines, and plums that were in effect from 1980 through 1987 does not present an issue of broad legal importance. Nor does it have continuing importance, since, as noted above, the Secretary amended the marketing orders in 1988 explicitly to adopt the "well-matured" standard and again in 1992 to make compliance with that standard voluntary. Cf. *District of Columbia* v. *Sweeney*, 310 U.S. 631 (1940) (certiorari denied because statute at issue had been repealed and question presented was "therefore not of public importance"). In any event, cross-petitioners' challenge is without merit.

In arguing that the 1980 amendment to the marketing orders did not change the "U.S. No. 1" grade previously in effect, cross-petitioners accord no effect to the language of the amendment. See note 4, *supra*. Their argument is therefore at odds with well-settled principles of interpretation. See, *e.g*, *Bailey* v. *United States*, 116 S. Ct. 501, 507 (1995) (citing *Platt* v. *Union Pacific R.R.*, 99 U.S. 48, 58 (1879)); *Gustafson* v. *Alloyd Co.*, 115 S. Ct. 1061 1069 (1995); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2413 (995). Moreover, as noted above, the grade "U.S. No. 1" governs not only fruit maturity, but also other characteristics of fruit. See note 3, *supra*. In contrast, the 1980 amendment exclusively addressed the issue of fruit

maturity. That makes cross-petitioners' insistence that the proviso simply re-expressed the U.S. No. 1 standard of maturity particularly unpersuasive.

Thus, contrary to cross-petitioners' contention (Cross-Pet. 21), the text of the marketing orders was not so "plain" that the court of appeals was confined to the "four corners" of the orders in reviewing cross-petitioners' challenge to the application of the "well-matured" standard.[8] Instead, the court properly reviewed the administrative record, and it correctly found support there for the Secretary's view that the orders authorized the "well-matured" standard. See 45 Fed. Reg. 45,252 (1980) ("Under the amendment, California fresh nectarine shipments are required to grade at least U.S. No. 1, except that provision is made for a higher maturity standard based on color standards by variety or other specified tests."). The court's decision upholding the Secretary's view comports with decisions of this Court that accord considerable deference to an agency's interpretation of its own regulations, see, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994); *Stinson* v. *United States*, 113 S. Ct. 1913, 1919 (1993); *Martin* v. *OSHRC*, 499 U.S. 144, 150-151 (1991), especially where, as here, that interpretation was contemporaneous with the regulations and has been consistently followed. See *Davis* v. *United States*, 495 U.S.

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[8] Indeed, even in *Wileman Bros. & Elliott, Inc.* v. *Giannini*, 909 F.2d 332, 335-336 (1990), upon which cross-petitioners rely (see note 9, *infra*), the Ninth Circuit observed that "[t]his new [1980] language governing standards and tests is ambiguous as to whether the maturity standards themselves were being or would subsequently be modified and, if so, by whom."

472, 484 (1990); see also *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2159 (1993).[9]

Cross-petitioners err in contending (Cross-Pet. 25-26) that the 1980-1987 maturity provisions were unconstitutionally vague because they gave inadequate notice of conduct (*i.e.*, violation of the marketing orders) that was subject to criminal penalties. The fact that the maturity provisions were amended in 1980 signalled a change in the prior maturity standard, and the setting in which that change occurred made clear that the change took the form of a heightening of the standard. Moreover, the actual color standards applicable to each variety of nectarine, peach, and plum were well-publicized. They were announced each season and published by the marketing committees in bulletins distributed to all members of the industry. Indeed, cross-petitioners admit that the bulletin announcing the new maturity standard for nectarines was "supplied to all growers and handlers of nectarines" and that it explicitly stated that the fruit was required to meet the "well-matured" standard. Cross-Pet. 6. As quoted by cross-petitioners, that bulletin eliminated any doubt about whether the 1980 marketing orders raised the maturity standard by explaining that "[t]his maturity requirement is more advanced than the maturity requirement of the U.S. No. 1 grade." *Ibid.* In those

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[9] Cross-petitioners contend that the Ninth Circuit's decision below conflicts with its prior decision in *Wileman Bros. & Elliott, Inc.* v. *Giannini*, *supra*. The Ninth Circuit, however, is the best authority on the proper reading of its precedent, cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), and it explained in the present case that there is no such conflict, Pet. App. 25a.

circumstances, cross-petitioners had fair notice of the maturity standard.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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